

15

FEDERAL COURT OF AUSTRALIA

Rural Export & Trading (WA) Pty Ltd v Hahnheuser

[2008] FCAFC 156

TRADE PRACTICES – *Trade Practices Act 1974* (Cth), s 45DB(1) boycotts affecting trade or commerce – concerted interference with trade or commerce involving the movement of goods between Australia and places outside Australia – exemption from liability where dominant purpose substantially related to environmental protection – deliberate contamination of feed for sheep intended for live export – export of all sheep delayed and export of some sheep prevented – whether primary judge correct in finding that s 45DD(3) applied to exempt perpetrator from liability – whether conduct intended to protect sheep from perceived suffering during live export on ship had “dominant purpose...substantially related to environmental protection” – whether onus of proving or negating dominant purpose borne by party alleging contravention of general provision or on party alleging existence of dominant purpose

Held: Appeal allowed – protection of sheep from harm during voyage from Australia to overseas not capable of being environmental protection or substantially related to environmental protection – observations on onus of proof of purpose under s 45DD(3)

WORDS AND PHRASES – “environment”, “environmental protection”

Acts Interpretation Act 1901 (Cth) ss 15AB(2)(e)

Trade Practices Act 1974 (Cth) ss 45DB, 45DD sub-ss (3), (6), (7), (8)

Export Control (Animals) Orders O 8, 10A

Ahern v The Queen (1988) 165 CLR 87 followed

Liversidge v Anderson [1942] AC 206 cited

Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355 followed

Queensland v Murphy (1990) 95 ALR 493; (1990) 64 ALJR 593 considered

Rural Export & Trading (WA) Pty Ltd v Hahnheuser (2007) 243 ALR 356 reversed

Vines v Djordjevitch (1955) 91 CLR 512 followed

RURAL EXPORT & TRADING (WA) PTY LTD and SAMEX AUSTRALIAN MEAT CO PTY v RALPH HAHNHEUSER
VID 953 OF 2007

FRENCH, RARES & BESANKO JJ
22 AUGUST 2008
MELBOURNE

**IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY**

VID 953 OF 2007

ON APPEAL FROM A SINGLE JUDGE OF THE FEDERAL COURT OF AUSTRALIA

**BETWEEN: RURAL EXPORT & TRADING (WA) PTY LTD
First Appellant**

**SAMEX AUSTRALIAN MEAT CO PTY
Second Appellant**

**AND: RALPH HAHNHEUSER
Respondent**

JUDGES: FRENCH, RARES & BESANKO JJ

DATE OF ORDER: 22 AUGUST 2008

WHERE MADE: MELBOURNE

THE COURT ORDERS THAT:

1. The appeal be allowed with costs, save that there be no order as to costs with respect to grounds 10 and 11 of the notice of appeal.
2. Orders 3 and 4 made by the primary judge on 4 October 2007 be set aside and in lieu thereof, order that:
 - (a) it be declared that on or about 18 and 19 November 2003 at Portland, Victoria, the first respondent, in concert with another person or persons, engaged in conduct for the purpose and which had the effect of preventing and substantially hindering the second applicant from engaging in trade or commerce involving the movement of goods on the vessel *MV Al Shuwaikh*, being a cargo of live sheep, between Australia and places outside Australia in the Middle East, in contravention of s 45DB(1) of the *Trade Practices Act 1974* (Cth);
 - (b) the first respondent pay the second applicant's costs.
3. The proceedings be remitted to the primary judge for further hearing in accordance with these reasons.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

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**AND: RALPH HAHNHEUSER
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JUDGES: FRENCH, RARES & BESANKO JJ

DATE: 22 AUGUST 2008

PLACE: MELBOURNE

REASONS FOR JUDGMENT

THE COURT:

1 Late on the night of 18 November 2003 Ralph Hahnheuser and others entered into a paddock of a sheep feed lot in Portland, Victoria. He placed ham and water into two feed troughs from which about 1,700 sheep fed. The sheep were being held in the feed lots and prepared there to be exported alive on a ship, the MV *Al Shuwaikh* on about 21 November 2003. The next day, 19 November 2003, Mr Hahnheuser, who was a member of Animal Liberation SA Inc, publicised what he had done by issuing a press release and participating in a series of media interviews. He caused a video to be made of the contamination of the feed. He explained that the contamination of the sheep feed by adding ham, was designed to prevent it meeting Halal requirements for the preparation of food suitable for consumption by Muslims in Middle Eastern destinations.

2 The primary judge found that the activity of Mr Hahnheuser and his collaborators was engaged in for a dominant purpose which was “substantially related to environmental protection” within the meaning of s 45DD(3)(a) of the *Trade Practices Act 1974* (Cth): *Rural Export & Trading (WA) Pty Ltd v Hahnheuser* (2007) 243 ALR 356 at [70]-[71]. He

found that Mr Hahnheuser, as he had said in his interviews, was trying to stop the sheep in the two feed lots from being loaded aboard the *Al Shuwaikh* for export to the Middle East. The primary judge also found that these actions prevented the export of the 1,694 sheep in the feed lot into which the contaminant was introduced and substantially hindered the export of sheep which were in an adjacent paddock within the meaning of s 45DB(1). But, he found that the dominant purpose of Mr Hahnheuser was to protect the sheep from the suffering that he perceived they would undergo if they were shipped to the Middle East and that this was within the meaning of “environmental protection” in s 45DD(3). The primary judge also found that the onus was on an applicant under s 45DB(1) to prove that the respondent did not have a defence under s 45DD(3)(a). That is to say, the respondent did not have, as the dominant purpose for which he or she engaged in the impugned conduct, a purpose substantially related to environmental protection.

3 Thus, the two substantial issues in the present appeal are whether the primary judge was correct in holding that:

- (1) the protection of sheep from suffering, which Mr Hahnheuser perceived they would undergo if they were shipped to the Middle East, was within the meaning of “environmental protection” as used in s 45DD(3)(a);
- (2) the onus of proving or negating that the dominant purpose, for which Mr Hahnheuser had engaged in the conduct complained of, was substantially related to environmental protection had been discharged, and by whom it was borne.

STATUTORY SCHEME

4 Relevantly, ss 45DB and 45DD(3), (6), (7) and (8) of the Act provided as follows:

“45DB Boycotts affecting trade or commerce

- (1) A person must not, in concert with another person, engage in conduct for the purpose, and having or likely to have the effect, of preventing or substantially hindering a third person (who is not an employer of the first person) from engaging in trade or commerce involving the movement of goods between Australia and places outside Australia.

Note 1: Conduct that would otherwise contravene this section can be authorised under subsection 88(7).

Note 2: This section also has effect subject to section 45DD, which deals with permitted boycotts.

- (2) A person is taken to engage in conduct for a purpose mentioned in subsection (1) if the person engages in the conduct for purposes that include that purpose.

45DD Situations in which boycotts permitted

...

Dominant purpose of conduct relates to environmental protection or consumer protection

- (3) A person does not contravene, and is not involved in a contravention of, subsection 45D(1), 45DA(1) or 45DB(1) by engaging in conduct if:
- (a) the dominant purpose for which the conduct is engaged in is substantially related to environmental protection or consumer protection; and
 - (b) engaging in the conduct is not industrial action.

Note 1: If an environmental organisation or a consumer organisation is a body corporate:

- (a) it is a "person" who may be subject to the prohibitions in subsections 45D(1), 45DA(1) and 45DB(1) and who may also be covered by this exemption; and
- (b) each of its members is a "person" who may be subject to the prohibitions in subsections 45D(1), 45DA(1) and 45DB(1) and who may also be covered by this exemption.

Note 2: If an environmental organisation or a consumer organisation is not a body corporate:

- (a) it is not a "person" and is therefore not subject to the prohibitions in subsections 45D(1), 45DA(1) and 45DB(1) (consequently, this exemption does not cover the organisation as such); but
- (b) each of its members is a "person" who may be subject to the prohibitions in subsections 45D(1), 45DA(1) and 45DB(1) and who may also be covered by this exemption.

...

Subsections (1), (2) and (3) do not protect people not covered by them

- (6) In applying subsection 45D(1), 45DA(1) or 45DB(1) to a person who is not covered by subsection (1), (2) or (3) in respect of certain conduct, disregard the fact that other persons may be covered by one of those subsections in respect of the same conduct.

Defences to contravention of subsection 45DB(1)

- (7) In a proceeding under this Act in relation to a contravention of subsection 45DB(1), it is a defence if the defendant proves:

- (a) that a notice in respect of the conduct concerned has been duly given to the Commission under subsection 93(1) and the Commission has not given a notice in respect of the conduct under subsection 93(3) or (3A); or
- (b) that the dominant purpose for which the defendant engaged in the conduct concerned was to preserve or further a business carried on by him or her.

Each person to prove defence

- (8) If:
 - (a) a person engages in conduct in concert with another person; and
 - (b) the other person proves a matter specified in paragraph (7)(a) or (b) in respect of that conduct;

in applying subsection 45DB(1) to the first person, ignore the fact that the other person has proved that matter.

Note: Section 170MT of the *Workplace Relations Act 1996* limits the right to bring actions under this Act in respect of industrial action that is protected action for the purposes of that section.”

THE FACTUAL MATRIX

5 There was no dispute that the primary judge correctly found that Mr Hahnheuser had engaged in conduct in concert with another person or persons which had the purpose of preventing or substantially hindering the second appellant, Samex Australian Meat Co Pty Ltd, from exporting its consignment of sheep to the Middle East. Thus, unless the dominant purpose for which the conduct Mr Hahnheuser engaged in was substantially related to environmental protection, he contravened s 45DB(1). Rural Export & Trading (WA) Pty Ltd, the first appellant, failed in the proceedings below and did not press any separate argument on appeal. Rural Export claimed that it had suffered loss or damage under s 82 by Mr Hahnheuser’s contravention of s 45DB(1) which affected Samex in trade or commerce. The primary judge made no final determination of that issue. Thus, if Samex’s appeal succeeds, then the primary judge will need to consider Rural Export’s claim under s 82 of the Act.

6

The primary judge drew heavily on statements made by Mr Hahnheuser in the video and interview evidence tendered against him by Rural Export and Samex. Mr Hahnheuser did not give evidence. The primary judge referred to Animal Liberation's and to Mr Hahnheuser's media release and an associated video. These disclosed his and his colleagues activities in contaminating the feed with ham. The media release was headed "Lightening Direct Action Prevents Loading of Cruel Live Exports Ship". It announced that Animal Liberation had said that the secret operation had been completed overnight and would prevent the loading of the *Al Shuwaikh* the next day. The media release continued:

"A carefully planned operation overnight, saw the addition of rendered pig meat extensively spread through the Portland feedlot food and water delivery system. ...

The consumption of pig meat by the sheep has rendered them unsuitable for export to Muslim countries. ...

The Australian Government and Middle East ambassadors will be notified by Animal Liberation immediately, to prevent the treated animals from being loaded tomorrow morning, to avoid inevitable rejection in the middle east."

7

The primary judge referred to the fact that in his videoed interviews Mr Hahnheuser wore a black T-shirt endorsed with the words "Ban Live Export". There, Mr Hahnheuser referred to a campaign of more than 20 years' duration to achieve the banning of live exports, and to a government recommendation to cancel the practice "on the basis of animal welfare". In the publicity Mr Hahnheuser described the export of live animals as "this appalling industry". He also referred to "appalling atrocities" to which the animals were subjected during their export as live animals. Mr Hahnheuser referred to additional suffering imposed on animals in the live export trade compared to those slaughtered in Australia. He described the animals as being crammed into relatively small areas on ships and to them being taken through hot and humid areas. He referred to enormous burdens on the animals, and to their death rates which he asserted were ten or twenty times higher than those on farms. Mr Hahnheuser referred to a previous Senate enquiry recommending that "on animal welfare grounds alone ... this cruel industry" should be banned. He also said that the decision to be made was an ethical one about how much suffering could be justified for how much profit. He described the exporters as breaching animal protection legislation in every State in which they operated.

8

The export of live sheep was regulated under the *Export Control (Animals) Orders (No 2) 1990* made under the *Export Control (Regulations) 1982* (Cth). The Orders provided that an exporter had to satisfy an authorised officer of the Commonwealth before an export permit could be issued concerning, among other things, the preparation of the animal or consignment for shipment overseas and the adequacy of the animal's or consignment's travel arrangements for its health and welfare (O 8(e)). There also were national standards for the preparation and carriage of sheep by sea. The notes to Order 8(d) and (e) stated that in determining whether each animal was sufficiently fit to undertake an export journey without any significant impairment of health, among other things, the authorised officer was to have regard to the conditions which the animal would be likely to encounter during the export journey, whether it had been handled in accordance with the relevant standards, the nature and equipment of the transport by which the animal was to be conveyed to the place of export and the risk of the animal being injured by enclosures or ramps to be used for loading it for export.

9

Immediately after Mr Hahnheuser's contamination activities were made public on 19 November 2003, the Secretary of the Department of Agriculture, Fisheries and Forestry issued a direction under O 10A that an export permit not be granted for the consignment of the sheep affected by Mr Hahnheuser's activities. The Secretary's grounds for the direction were that he:

- had received information that members of the Animal Liberation Movement might have taken action that had resulted in the animals included in the consignment having been fed rendered pig meat, which if true, was likely to make them unacceptable to people of the Muslim faith;
- believed that there was a strong likelihood that, whether or not the information was true, the publicity surrounding the incident meant that the intended countries of destination would not permit entry of the consignment of approximately 77,200 sheep aboard the *Al Shuwaikh*.

10

Ultimately, about two weeks later, the Secretary varied the direction to allow all but the 1,694 sheep which had been in the feed lot where contamination occurred to be loaded in

an export shipment. The delay, including holding *Al Shuwaikh* in Bass Strait while the Secretary was persuaded to permit a partial export of the original consignment, was self-evidently expensive.

11 The primary judge found that Mr Hahnheuser was the principal actor in the three episodes that constituted the conduct complained of. He had mixed the ham and water in a bathroom of a motel at Portland. He then put the mixture into a water container and distributed the ham and tainted water in the feed lot. He also gave interviews. His name appeared on the press release. The primary judge also found that Mr Hahnheuser did not act alone, and was videoed by at least one other person in the bathroom at the motel. The judge also found that at least two other persons were present with Mr Hahnheuser in the feed lot, one operating the video camera and another who was shown in the video walking with Mr Hahnheuser and wearing a T-shirt similar to the one Mr Hahnheuser wore. Also, in some of the television interviews there were two people shown standing behind Mr Hahnheuser holding up signs shaped like animals with slogans written on them.

12 His Honour found that Diana Simpson, who had made the hotel room booking, was present as was Mark Pearson, whose name appeared on the press release and who paid for the room. The primary judge found that the other persons involved were willing participants and there was nothing to suggest that they had been coerced so as to prevent them from being taken to have acted in concert with Mr Hahnheuser. He ultimately found two or more persons acted in concert to carry out the conduct complained of, and that one of them was Mr Hahnheuser.

13 The primary judge found that Mr Hahnheuser's subjective purpose for engaging in the conduct was that he was trying to stop the sheep in the two feed lots from being loaded aboard the *Al Shuwaikh* for export to the Middle East. However, his Honour said that there was little known about each of the other persons involved or their intention. He observed that this made determining their subjective purposes difficult. But he concluded that because Mr Pearson had lent his name to the media release and a person had held up supportative signs when Mr Hahnheuser appeared in the interviews it was reasonably open to find that the representations made by Mr Hahnheuser in the media interviews had been made by him in furtherance of a common purpose with the persons with whom he acted in concert. The

primary judge applied s 87(1)(c) of the *Evidence Act 1995* (Cth) to find that those representations were admissions of the other persons. Additionally, Mr Hahnheuser had expressed himself in the interviews as a spokesperson for others when he elaborated on the conduct complained of. Thus, the primary judge found that Mr Hahnheuser's subjective purpose was also the subjective purpose of the other person or persons with whom he had acted in concert.

MR HAHNHEUSER'S STATE OF MIND

14 Of course, it is not always possible to prove directly the state of mind of a person involved in a particular event or activity. Often, in criminal proceedings, there will be no direct evidence of the mens rea (or subjective intention) with which an accused performed the act complained of. But that will not prevent a jury or trial judge from being able to be satisfied beyond reasonable doubt that the accused acted with such an intent. A person's subjective intention and state of mind can be inferred in all the circumstances. Juries do this every day in criminal courts.

15 Here, Mr Hahnheuser trespassed onto a feed lot in the dead of night with others. Between them, they were carrying video equipment and shredded ham or pig meat. They videoed the acts of contamination of the feed given to the sheep together with their preparatory activities in the hotel. They then participated in media interviews and issued a media release stating in terms that they were providing evidence "that will prevent loading of the Live Export carrier, *Al Shuwaikh*". In these circumstances there is no difficulty in finding that, by acting in that way, each had the purpose of interfering with the export of the sheep from Australia. The separate acts of alleged conspirators or persons acting in concert may prove both the fact of combination and their participation, though this is not always necessarily so: see *Ahern v The Queen* (1988) 165 CLR 87 at 93-94 per Mason CJ, Wilson, Deane, Dawson and Toohey JJ. Here, the acts of each person depicted in the video, and of the person who took the video, were facts from which it was safe to infer that those persons were acting in concert: *Ahern* 165 CLR at 94. Mr Hahnheuser's statements in the interviews were, as the primary judge found, further evidence of the concerted conduct of him and his collaborators.

THE PRIMARY JUDGE'S REASONING ON DOMINANT PURPOSE

16 The particulars of Mr Hahnheuser's defence asserted that his dominant purpose was to protect sheep from cruelty and suffering as a result of live transport by ship to, and arrival in, the Middle East and also to increase public awareness and education of the suffering and cruelty suffered by sheep during live transport by ship. The primary judge said this raised the question whether that dominant purpose, namely the prevention of cruelty to and suffering of animals, fell within the meaning of "environmental protection" in s 45DD(3). His Honour relied on observations by the High Court in *Queensland v Murphy* (1990) 95 ALR 493 at 498 that the ordinary meaning of the word "environment" signified "that which surrounds" and the word had long been understood to "include the conditions under which any person or thing lives".

17 The primary judge reasoned that there was nothing in s 45DD(3) to indicate that the word "environmental" was used in a more narrow sense than its ordinary meaning and that "environmental protection" meant the protection of the environment. He relied on statements made in the Senate during the second reading speeches for the insertion of s 45DD(3) to confirm a meaning that, in s 45DD(3), the expression "'environmental protection' includes sheep generally". He said that no reason appeared for drawing any distinction between animals bred as farming stock to be slaughtered for the production of food for humans, and other animals. He said that farm animals were as much a part of the human environment as wild and domestic animals. His Honour also and said that there was no reason why the protection of the conditions in which farm animals were kept should be excluded from the concept of environmental protection.

18 The primary judge found that:

'... Mr Hahnheuser's dominant purpose was the protection of animals from the suffering that he perceived they would undergo if they were shipped to the Middle East.'

His Honour held that there was little doubt that the conditions which the sheep would experience on the vessel were disadvantageous to them, compared to the conditions in which they would generally be placed on farms. He found that there was no need to prove an objective foundation for the proposition that the sheep needed protection from any harm they would suffer during shipment to the Middle East.

19 This led to his finding that Mr Hahnheuser did not contravene and was not involved in the contravention of s 45DB(1), because he engaged in the conduct complained of with a dominant purpose that was substantially related to environmental protection.

CONSIDERATION

20 The appellants argued that this reasoning involved a syllogism. First, sheep were part of the environment. Secondly, sheep needed protection from the cruelty and suffering of being transported by ship. Thirdly, it followed that the protection of sheep from such treatment was environmental protection. Mr Hahnhauser, who had not appeared at the trial, submitted, through his counsel who argued the appeal, that the meaning identified by the primary judge was correct. He contended that the protection of one or more creatures or plants from harm and the prevention of harm to them were within the meaning of “environmental protection” as used in s 45DD(3).

21 In our opinion, his Honour’s and Mr Hahnheuser’s construction of s 45DD(3) should not be accepted. The expressions “environmental protection” and “consumer protection” as used in s 45DD(3) are not defined in the Act. The Macquarie Dictionary (online) defines “consumer protection” as:

“consumer protection

noun the combined laws relating to the protection of purchasers of goods and services from excessively high prices, faulty design, injurious side-effects, etc.”

22 However, “environmental protection” as an expression is not defined in any dictionary to which we were taken. Relevantly the Macquarie Dictionary (online) defines “environmental” and “protection” as including the following senses:

“Environmental

adjective 1. of or relating to an environment or environments.

2. of or relating to the natural environment, its protection and conservation: *environmental issues*.

3. of or relating to issues affecting the environment.”

“Protection

noun 1. the act of protecting.

2. the state of being protected.

3. preservation from injury or harm.
4. something that protects....”

23 In *Queensland v Murphy* 95 ALR at 498 Mason CJ, Brennan, Deane, Gaudron and McHugh JJ considered the word “environment” as used in a statutory expression “... whether any deleterious effect on the environment would be occasioned”. They said, in a passage quoted by the primary judge:

“In its ordinary meaning ‘environment’ signifies that which surrounds and has long been understood to include ‘the conditions under which any person or thing lives’: *Oxford English Dictionary*, 2nd ed (1989). The latter usage dates from 1827 when Thomas Carlyle used the word to mean ‘the aggregate of external circumstances, conditions, and things that affect the existence and development of an individual, organism, or group’. See Hendrickson, *The Encyclopedia of Word and Phrase Origins* (1987).”

Importantly, in the next sentence, which the primary judge did not quote, their Honours continued:

“What constitutes the relevant environment must be ascertained by reference to the person, object or group surrounded or affected.”

24 The expression “environmental protection” in its ordinary and natural meaning does not refer simply to the protection of the natural environment. It also can refer to the built environment, such as a heritage building, streetscape or, perhaps, a particular instance of town planning. Thus, the protection of some artificial aspects of the environment can be within the scope of “environmental protection” in s 45DD(3). But the “environment” referred to in the expression ordinarily will be a particular location, thing or habitat in which a particular individual instance or aggregation of flora or fauna or artifice exists. And the “protection” is to preserve the existence and or characteristics of that environment being that location, thing or habitat which may include, or consist only of, that individual instance or aggregation. For present purposes, it is not necessary to essay an exhaustive definition. It is sufficient to say that the concept does not extend as far as his Honour found, nor as far as the respondent proposed.

25 In the present matter, Mr Hahnheuser did not have the dominant purpose of protection of the sheep in the environment of the paddock; he was seeking to protect them from what he asserted would be the conditions they would experience on board a ship engaged in a voyage

from Australia to the Middle East. His protest was against live exports of sheep. He was not seeking the protection of any environment, particularly not that of the ship. Nor was he seeking to prevent the same sheep being slaughtered here for food, rather than in the Middle East at the end of the voyage. As he said in one of the interviews:

“Well certainly ultimately these sheep would have either have been slaughtered in Australia in any event if they had been purchased for the Australian market or if they do end up being exported then obviously they would be slaughtered overseas. So that is the inevitable fate of the sheep that is what they are being bred for. But we have succeeded in doing is further highlighting the appalling atrocities that occur to these animals, these sheep and cattle for live exports on a routine basis when they are exported from Australia.” (sic, emphasis added)

26 The activity Mr Hahnheuser described (which is similar to the particulars of his pleaded defence) did not relate to environmental protection. Rather, it related to the conditions to which he believed the sheep would be exposed when they left the paddock and were placed on board the vessel. When on the vessel the sheep would be in an environment from which Mr Hahnheuser and his collaborators believed the sheep needed to be protected. But it is contrary to commonsense to suggest that, simply because the sheep may at one time or other have been part of a particular environment, whether in the feed lot, on the farms or stations on which they were bred or pastured, or on board a vessel, protection of the sheep from a perceived harm in a different environment on the vessel is related to environmental protection within the meaning of s 45DD(3). To acknowledge that the sheep may be part of the environment on board the vessel does not result in the conclusion that prevention of the sheep from being placed in that environment is “environmental protection”.

27 Mr Hahnheuser had no purpose to protect either the environment from which the sheep were to be removed (the feed lot) or the environment to which they were to be transferred (the ship). To the contrary, he was endeavouring to prevent the sheep from being introduced into the environment of the ship.

28 The desire to protect an existing environment by preventing the habitat of flora or fauna living there from being altered or, perhaps, encouraging its restoration is one thing. But, it is quite another to contend that “environmental protection” can involve preventing

sheep being loaded on board a ship, not to preserve or protect the environment of the holding pens on board, but to protect the sheep **from** being in that environment.

29 The appellants submitted that whether the facts fell within the phrase “substantially related to environmental protection” was to be determined purely objectively, and one matter which must be present is evidence that the relevant environment would otherwise suffer harm from which it needed protection. They argued that that could not be shown here because the only evidence in favour of such a conclusion consisted of the self-serving statements of Mr Hahnheuser in his media releases about this “appalling industry”, “appalling atrocities” and the like. The appellants submitted that as against that material, there was very strong evidence that the sheep would not suffer harm during their journey overseas. They referred to the detailed provisions in the *Export Control (Animals) Order* which required adequate arrangements to be made for the health and welfare of live animals being exported.

30 The primary judge rejected this submission of the appellants. He said (*Rural Export* 243 ALR at 378 [70]):

“... I reject the submission that there has to be some objective demonstration of the need of sheep for protection from harm they would suffer during shipping to the Middle East. All that a subjective dominant purpose requires is that the person holding it have a belief that such protection is necessary. Plainly, on the evidence in this case, Mr Hahnheuser had such a belief.”

31 “Environmental protection” cannot be simply what the person seeking to invoke s 45DD(3) believes to be the dominant purpose for which he or she engages in the conduct. That would permit the person’s subjective belief to define conclusively the scope of the statutory provision. As Lord Atkin famously remarked in *Liversidge v Anderson* [1942] AC 206 at 244-245 that is a strained and uncontrolled construction supported only by Humpty Dumpty’s example of being able to choose a meaning for oneself. There must be an objective element in a dominant purpose substantially related to environmental protection which characterises what is relied on by the person, in fact, as “environmental protection”. The subjective element is that he or she had the dominant purpose to engage in the conduct complained of which was “substantially related to” the objective fact of “environmental protection” within s 45DD(3)(a). We need not express any opinion on another question of the construction of s 45DD(3). That is whether the exemption in s 45DD(3) is lost if the

effect on the environment of the activity from which protection is sought would occur anyway because the activity would also be engaged in wholly for domestic trade or commerce: i.e. the hindering or prevention of overseas trade or commerce would not stop the same detriment to the environment occurring for domestic trade or commerce in any event

32 To invoke s 45DD(3), a person must establish the existence of an objective state of fact consisting of an environment. The section is to do with protection of an environment; that is of something, be it a living habitat, or individual creature, or plant within a habitat, or a structure, or form which exists already in a context. The context, which will include the creature, plant, habitat, or structure, or form, is the environment. But, in order to amount to “environmental protection”, the thing sought to be protected must be either the whole context or the part which is threatened in its existence as part of the context.

33 The keeping of sheep in a temporary location, pending their being loaded on board a vessel for transport from Australia, the vessel itself (including locations on it), and the sheep as animals bred for consumption comprise the context which Mr Hahnheuser can rely on as the relevant environment.

34 The primary judge referred to the remarks of the Minister and of Senator Murray in the Senate, who jointly moved the introduction of what became s 45DD, as reinforcing his wide construction of “environmental protection”. There is no doubt that the expression in s 45DD(3) should be given a wide construction. The terms of the provision demonstrate that the Parliament was conscious of ensuring that the fundamental democratic right of expression of opinions on government and political matters relating to environmental and consumer protection should not be unduly proscribed or constrained. But a wide construction nonetheless has bounds. The Parliament also sought, in s 45DB(1), to protect the nation’s overseas trade from concerted interference with the movement of goods in or out of Australia, but excepted, in s 45DD, certain categories of permitted interference. Both ss 45DB and 45DD interact and so require a construction of their literal or grammatical meanings which respects the context which each section gives the other: cf: *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381-382 [69]-[71], 384-385 [78]-[80] per McHugh, Gummow, Kirby and Hayne JJ.

35 The concept of “environmental protection” is broad when used in s 45DD(3). However, as the passage referred to above in *Queensland v Murphy* 95 ALR at 498 shows, “environment”, in its ordinary and natural usage, refers to an aggregate or overall context in which particular things exist. While “environmental protection” may sometimes extend to protecting a particular species, whether of flora or fauna, it does so in the context of the environment in which that species exists. Thus, where some human activity was occurring which was causing a threat to the continued existence of a species (e.g. by destroying the natural habitat of an animal), an activity directed to prevent the operation of the threat would be capable of being found to be engaged in for the dominant purpose which was substantially related to “environmental protection”, i.e. the conduct could relate to a means of preventing that species being or remaining under threat from the activity.

36 But, it would be absurd to say that because lawns grow in the ordinary course in the urban environment of a suburban street, “environmental protection” in s 45DD(3) would extend to preventing someone mowing their own domestic backyard so as to prevent the grass from growing too long. In nature, the grass would grow undisturbed by human intervention. Domestic animals bred for the production of food, just as crops bred for that purpose, form part of the environment. But, in their ordinary and natural meaning of “environmental protection” as used in s 45DD(3), the prevention of movement of those animals or crops to a particular new location (being a location which was itself not threatened with harm by the introduction of the animals or crops) could not, realistically be connoted.

37 Rather, the context in which the artificial introduction of human activity, such as the breeding of plants or animals for food, shows that particular part of the environment has been created for a particular purpose from which it does not need protection. It is not naturally occurring or individually unique (such as, perhaps, an historic building). In any event historic buildings would not be, in the ordinary course, used in the course of exporting goods and services from Australia in a way that could be such as would invoke notions of environmental protection.

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38 The primary judge reasoned that the symmetry of the provisions in s 45DD as a whole, including and surrounding ss 45DD(1)-(6), was “shattered, however, when subs (7)

was examined” (*Rural Export* 243 ALR at 377 [67]). He said that the form of s 45DD(7) differed markedly from the formula adopted in ss 45DD(1)-(3). His Honour noted that s 45DD(7) also provided an exception to the operation of s 45DB(1), but it expressly stated that that exception operated as “... a defence if the defendant proves” the specified elements. He reasoned that, because s 45DD was enacted as a whole, the differences in wording between its various subsections was important, and that only s 45DD(7) contained a specific provision about the onus of proof. That being so, the primary judge concluded that the applicant for relief under s 45DB(1) had to negate the existence of the dominant purpose referred to in s 45DD(3).

39 In light of the conclusion that Mr Hahnheuser did not have the dominant purpose required by s 45DD(3), it is not necessary to determine finally whether the primary judge erred in his construction of the operation of the section’s distribution of the burden of proof. However, as the matter was fully argued, it is possible to state our tentative view.

40 In the notes to s 45DD(3) set out in the Government printer’s version of the Act, the provision is described as “this exemption”. The notes are available to assist in determining the meaning of an ambiguous or obscure provision, such as s 45DD(3), by force of s 15AB(2)(a) of the *Acts Interpretation Act 1901* (Cth). Notwithstanding that s 45DD(7) expressly creates a defence, the form of s 45DD(3) in its natural and ordinary meaning is also that of an exemption. Ordinarily, the rule applicable in such a situation was stated by Dixon CJ, McTiernan, Webb, Fullagar and Kitto JJ in *Vines v Djordjevitch* (1955) 91 CLR 512 at 519-520 as follows:

“But in whatever form the enactment is cast, if it expresses an exculpation, justification, excuse, ground of defeasance or exclusion which assumes the existence of the general or primary grounds from which the liability or right arises but denies the right or liability in a particular case by reason of additional or special facts, then it is evident that such an enactment supplies considerations of substance for placing the burden of proof on the party seeking to rely upon the additional or special matter.” (citations omitted)

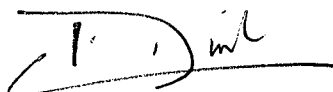
41 In addition, the language of s 45DD(3) fixes upon the dominant purpose of the person whose conduct is complained of as having contravened s 45DB(1). Ordinarily, he or she would be in the best position to give evidence as to his or her having the dominant purpose which would exculpate him or her from liability.

42 For these reasons, it appears preferable to approach the construction of s 45DD(3) as requiring the respondent to an application under s 45DB(1) to discharge the burden of proving that he or she fell within the exemption provided by s 45DD(3), notwithstanding the express reference to a defence under s 45DD(7). However, it is not necessary to express a concluded view since the appeal succeeds in any event.

43 Rural Export and Samex asked that if Samex succeeded the matter be remitted to the primary judge for determination of the questions of damages. The appeal should be allowed, a declaration should be made reflecting the fact that Mr Hahnheuser contravened s 45DB(1) and he should be ordered to pay the costs of the proceedings below and on appeal.

I certify that the preceding forty-three (43) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices French, Rares & Besanko.

Associate:



Dated: 22 August 2008

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Date of Hearing: 26 May 2008

Date of Judgment: 22 August 2008